STATE OF MICHIGAN

COURT OF APPEALS

JIMMY JOHNSON,

Plaintiff-Appellant,

v

RONALD MCCOMB and HILGA MCCOMB,

Defendants-Appellees,

and

KEVIN GREER, BILLIE JO GREER, HOWARD GREEN, BRENDA GREEN, and JOHN/JANE DOES,

Defendants.

UNPUBLISHED
May 19, 2011

No. 297160
Ingham Circuit Court
LC No. 08-000957-NZ

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Plaintiff, Jimmy Johnson, appeals as of right from a circuit court order granting summary disposition to defendants Ronald and Hilga McComb ("defendants") pursuant to MCR 2.116(C)(10).[1] We affirm.

Plaintiff was injured in an attack by two dogs owned by defendants Kevin and Billie Jo Greer. The attack occurred while plaintiff was standing in his own yard. The dogs had escaped from the backyard of nearby property owned by defendants, which they leased to Janice Lingo. Although the Greers lived on another street, plaintiff alleged and presented evidence that the dogs were "regularly housed" at Lingo's leased property. The parties presented conflicting

[1] Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). Although the trial court did not specify that it was granting summary disposition under subrule (C)(10), it considered evidence outside the pleadings, so it is appropriate to review its decision under MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

evidence concerning the dogs' presence at the leased property and defendants' knowledge of their presence and temperament before the attack. The trial court granted defendants' motion for summary disposition on the basis that they did not owe plaintiff a duty of care.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether defendants owed a duty to plaintiff is a question of law subject to de novo review. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

Whether a defendant owes a duty to the plaintiff is a threshold question in a negligence action. *Id.* "Under the common law, 'as a general rule, there is no duty that obligates one person to aid or protect another.' There is, however, an exception to this general rule when a 'special relationship' exists between the plaintiff and the defendant." *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 25-26; 780 NW2d 272 (2010) (citation omitted). While it is true that the landlord-tenant relationship is one of the recognized "special relationships," and that defendants were landlords, plaintiff was not their tenant. *Id*. at 26 n 4. Therefore, plaintiff cannot rely on this relationship to establish that defendants owed him a duty. This case is not based on a premises liability or nuisance theory. Plaintiff does not claim that defendants owed him a duty as an invitee, or that the dogs amounted to a dangerous condition of the land. Such theories are not available in this case because plaintiff was not injured while on defendants' premises.[2]

"In Michigan, the question whether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides after assessing the competing policy considerations for and against recognizing the asserted duty." *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 505; 740 NW2d 206 (2007) (citation and internal quotations omitted). "The inquiry involves considering, among any other relevant considerations, the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Id*. (citation and internal quotations omitted). "The most important factor to be considered is the relationship of the parties." *Id*.

In this case, plaintiff's only relationship to defendant is by virtue of the proximity of their properties. Plaintiff lived across the street from property owned by defendants, but leased to a third-party tenant. Plaintiff does not claim that this relationship is a basis for imposing a duty on defendants. Instead, he relies on provisions of the lease between defendants and the third-party tenant, to which plaintiff was not a party.

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[2] See *Stokes v Lyddy*, 75 Conn App 252; 815 A2d 263 (2003) (discussing these theories of liability in the context of a canine attack on a third party by a tenant's dog off the leased premises).

A duty of care "'may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract.'" *Fultz*, 470 Mich at 465, quoting *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967). However, where a tort action is based in contract and brought by a plaintiff who is not a party to the contract, "the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." *Id*. at 467. In *Fultz*, this Court recognized that a defendant performing its contractual obligations may breach a duty separate and distinct from its contractual duty when the defendant creates a new hazard. *Id*. at 469; *Boylan v Fifty-Eight Ltd Liability Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 291141, issued September 7, 2010), slip op at 4. Here, however, the parties do not discuss these limitations on the imposition of a duty, but instead focus on decisions that specifically involve canine attacks.

In *Feister v Bosack*, 198 Mich App 19, 26; 497 NW2d 522 (1993), this Court held that "the landlord had no duty to protect third parties from attacks by his tenants' dog taking place off the leased premises where the dog was acquired after the premises were leased." Like *Feister*, this case involves a canine attack that occurred off the leased premises by a dog that was not known to the landlord at the time the lease was executed.

Plaintiff attempts to distinguish *Feister* by looking to provisions in the lease. Specifically, plaintiff relies on a provision that prohibited dogs from being kept on the premises, a statement that "[t]he premises will not be used in such manner as . . . neighbors be harassed or bothered in any manner," and a provision stating that any infraction is grounds for immediate institution of eviction procedures. In light of these provisions, plaintiff contends that *Alaskan Village v Smalley*, 720 P2d 945 (Alas, 1986), and *Braun v York Props, Inc*, 230 Mich App 138; 583 NW2d 503 (1998), support the imposition of a duty in this case. We disagree, because neither of those cases involved an attack on a third party that occurred off the leased premises. Plaintiff asserts that defendants undertook a duty in this case, as in *Alaskan Village*, because of the provisions of the lease. However, plaintiff incorrectly asserts that *Alaskan Village* involved an attack off the leased premises. This factual distinction is significant. The court's reasoning in *Alaskan Village* emphasized that through restrictions in the lease, the landlord undertook a duty "to control pets *on the trailer park premises*." *Alaskan Village*, 720 P2d at 948. Imposition of a duty on a landlord to a third party who is injured off the landlord's property presents distinct legal issues that were not at issue in *Alaskan Village.*

In *Braun*, this Court rejected the injured plaintiff's argument that the defendants, owners and managers of a mobile home park, owed him a duty because of pet restrictions in the lease. Plaintiff here argues that liability should be imposed on defendants because, unlike in *Braun,* defendants had knowledge of the dogs' aggressive behavior. However, plaintiff reads *Braun* too narrowly; the absence of knowledge in *Braun* was only one aspect of this Court's rejection of a duty. This Court ultimately concluded that the landlord did not undertake to render services to another by including size restrictions and a prohibition on "dangerous breeds" in the lease. *Id*. at 148. Moreover, *Braun,* like *Alaskan Village,* does not address a landlord's duty to a third party with respect to injuries that occur off the premises.

We agree with the trial court that plaintiff has not shown that defendants owed him a duty. Plaintiff's reliance on provisions of the lease, to which he was not a party, is misguided; he must show a duty that is separate and distinct from the contract. The decisions on which plaintiff relies do not support the imposition of a duty on a landlord to a third party for an attack that occurs off the leased premises. The inclusion of restrictions in the lease is not an undertaking to render services.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Patrick M. Meter